Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1998

MORTIMER L. GRANT and
ALICE M. GRANT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

M. Leslie Grant
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28 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred affirming the denial of a double jeopardy challenge because it failed to apply the two-part test enunciated in *Hudson v. United States*.

II. Whether the Court of Appeals erred affirming the denial of a double jeopardy challenge because it failed to limit the application of *Helvering v. Mitchell* as limited by *United States v. Halper*.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Court of Appeals issued in support of its judgment is *United States v. Mortimer L. Grant; Alice M. Grant, et al*, unpublished, and is reprinted in Appendix A.

The order of the Court of Appeals denying the Grants' Petition for Rehearing is unpublished and is reprinted in Appendix B.

The order of the District Court summarily denying the Grants' Motion for Summary Judgment is unpublished and is reprinted in Appendix C.

JURISDICTION

The opinion of the Court of Appeals denying the Grants' Petition for Rehearing was filed on September 21, 1998. This petition is therefore timely under this Court's Rule 13.3.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves application of the following constitutional provisions and rules of court.

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .
>
> Fifth Amendment

STATEMENT OF THE CASE

On March 28, 1979, Alice M. Grant was charged with three counts of willful failure to file tax returns in violation of 26 U.S.C. § 7203 for the tax periods 1972, 1973 and 1974. On September 4, 1980, she was found guilty on all three counts. On October 6, 1980, she was sentenced to two years imprisonment, suspended, fined $20,000, and placed on five years probation. On or about September 11, 1985, a statutory notice of deficiency was issued against Alice M. Grant for the same tax years. Alice M. Grant petitioned the Tax Court, but said petition was dismissed as untimely filed on March 31, 1986. The taxes and fraud penalties alleged in the statutory notice of deficiency were assessed against Alice M. Grant on July 21, 1986 in the following amounts: 1972-$18,232.46/$9,116.23; 1973-$32,441.29/$16,220.65; and 1974-$22,959.51/$11,479.76. The civil fraud penalties were assessed against Alice M. Grant pursuant to 26 U.S.C. § 6653(b).

On March 28, 1979, M. Leslie Grant was charged with two counts of willful failure to file tax returns for the tax periods 1972 and 1973, pursuant to 26 U.S.C. § 7203, and one count of evasion for the tax period 1974, pursuant to 26 U.S.C. § 7201. M. Leslie Grant was convicted for the tax periods 1972 and 1973, and acquitted of the evasion

count for the tax period 1974. M. Leslie Grant was subsequently sentenced to 2 years in jail and fined $20,000. The United States jeopardy assessed taxes and civil fraud penalties against M. Leslie Grant on January 9, 1990 in the following amounts: 1972-$18,907.46/$9,453.73; 1973-$33,305.29/$16,652.65; and 1974-$24,002.31/$12,001.16. The taxes and fraud penalties were partially abated on May 18, 1992 to the following amounts: 1972-$13,459.77/ $6,730.73; 1973-$27,089.02/$13,544.51; and 1974-$18,276.24/$9,138.12. The civil fraud penalties were assessed against M. Leslie Grant pursuant to 26 U.S.C. § 6653(b).

The United States filed an action to reduce assessments to judgment and for foreclosure on September 29, 1995.

The Grants filed their Motion for Summary Judgment on May 13, 1996, on the ground that the tax fraud penalties asserted by the United States constitute a second punishment in light of the Grants' prior prosecution, conviction, and sentencing for tax crimes committed during the same years. Both parties to this action fully briefed this question of law.

On June 6, 1997, the District Court issued an order denying the motion for summary judgment without comment.

The Grants filed an interlocutory appeal, pursuant to *Abney v. United States*, 431 U.S. 651 (1977), to this denial of their double jeopardy challenge. On May 22, 1998, the

Court of Appeals filed its decision affirming the District Court holding that "additions to tax for fraud are not punishment for double jeopardy purposes."

On September 21, 1998, the Court of Appeals filed its order denying the Grants' motion for rehearing.

The Grants timely file this Petition for Writ of Certiorari with this honorable Court.

REASONS FOR GRANTING THE WRIT

The District Court summarily denied the Grants' double jeopardy challenge to the imposition civil fraud penalties after criminal tax convictions and fines. The Court of Appeals affirmed saying, "[t]his contention lacks merits because additions to tax for fraud are not punishment for double jeopardy purposes. *See, I & O Publ'g Co. v. CIR*, 131 F.2d 1314, 1316 (9th Cir. 1997)." *I & O Publishing*, in turn, relied upon this Court's decision of *Helvering v. Mitchell*, 303 U.S. 391 (1938).

The Court should grant a writ of certiorari for the following reasons.

First, the Court of Appeals decision conflicts with a relevant decision of this Court because it failed to apply the applicable two-part test enunciated in *Hudson v. United States*, 118 S.Ct 488, 139 L. Ed. 2d 450, 1997 U.S. LEXIS 7497 (1997).

Second, the Court of Appeals decision conflicts with a relevant decision of this Court because it failed to limit the holding of *Mitchell* to its facts as discussed in *United States v. Halper*, 490 U.S. 435, 442-43 (1989).

Third, the issue raised herein is an important question of federal tax law that should be settled by this Court.

ARGUMENT

I. THE COURT OF APPEALS ERRED BECAUSE IT FAILED TO CONSIDER THE TWO-PART TEST ENUNCIATED IN *HUDSON v. UNITED STATES*

The Court of Appeals' decision that additions to tax for fraud are, per se, not punishment for double jeopardy purposes relied solely on *I & O Publishing Co. v. C.I.R.*, 131 F.2d 1314 (9th Cir. 1997). That case was decided without considering the recent double jeopardy decision of *Hudson v. United States*, 118 S.Ct. 488, 139 L. Ed. 2d 450, 1997 U.S. LEXIS 7497. *Hudson* controls the resolution of this case.

In *Hudson*, the court returned to a two-part test of 1) determining whether Congress intended a criminal or civil punishment, and if civil, 2) whether the statutory scheme is so punitive in either purpose or effect to transform it into a criminal penalty. *Hudson*, 1997 U.S. LEXIS 7497, *12. The Grants do not contend that Congress intended a criminal penalty, so the second prong is dispositive of this

petition. *Hudson* listed seven factors as guideposts in making this determination: 1) whether the sanctions involve disability or restraint, 2) whether it has historically been regarded as a punishment, 3) whether it comes into play only on a finding of scienter, 4) whether its operation will promote the traditional aims of punishment — retribution and deterrence, 5) whether the behavior to which it applies is already a crime, 6) whether an alternative purpose to which it may rationally be connected is assignable for it, and 7) whether it appears excessive in relation to the alternative purpose assigned. *Hudson*, 1997 U.S. LEXIS 7497, *12-13.

A. The Fines Appears Excessive (Factor 7)

1. The Grants Have Already Been Fined to Compensate the Government.

The fraud penalties at issue cannot be said to be compensatory for the Grants' alleged fraudulent conduct because they have already been fined a total of $40,000 as part of their criminal judgments. Since the Grants have already been punished for the government's loss, no part of the fraud penalty can be said to be compensatory.

2. The Fraud Penalties are Punitive as a Matter of Law.

"Percentage based tax penalties that make no reference to specific costs indicate an intent to punish, rather than to compensate." *In re: Hovan, Inc.*, 96 F.3d 1254, 1258 (9th

Cir. 1996). More specifically, IRS penalties computed on flat rates bear no relationship to the direct financial loss to the government and have, on that basis alone, been held to be punitive penalties designed to punish for infractions of the tax code rather than compensate for pecuniary loss. *In re: Bossert*, 201 Bankr. 553, 560 (E.D. Wash. 1996).

3. The Fraud Penalty Has No Reasonable Nexus to the Government's Cost.

The fraud penalties are arbitrary and have no reasonable nexus to the government's increased costs resulting from the Grants' supposed fraudulent conduct. Fraud penalties were imposed in the following amounts: Alice M. Grant, 1972-$9,116.23, 1973-$6,220.65, and 1974-$11,479.76; M. Leslie Grant, 1972-$9,453.73, later abated to $6,730.73; 1973-$16,652.65, later abated to $13,544.51; and 1974-$12,001.16, later abated to $9,138.12. These amounts are unrelated to any governmental expense.

The Grants filed protest tax returns in both 1972 and 1973, *Grant v. C.I.R.*, T.C. Memo. 1991-406, so there was no governmental investigation necessary to "discover" their possible tax fraud. The primary basis for the government's assertion of tax fraud penalties against M. Leslie Grant was his failure to report income, his establishment of a foreign bank account, his failure to cooperate with IRS investigators, and his urging of

business associates not to provide information to the IRS.[1] *Id.* The government merely examined M. Leslie Grant's bank records to determine his taxable income. *Id.* While the physical time period required may be great to subpoena business associates and bank records of the Grants, evaluate the responses for other bank account information and subpoena those records, it primarily involves short intervals of work and long intervals of waiting. M. Leslie Grant was not allowed any deductions, *id.*, so it couldn't have cost the government much to calculate them. All three years were examined at the same time, so there is no basis for the costs to the government to differ as they do.

A civil penalty that bears no relationship to any governmental costs, and far exceeds any reasonable estimation of the cost for the work performed, cannot be said to have a rational relationship to additional costs incurred due to the Grants' conduct. Indeed, rather than the cost being proportional to the tax loss, logic would dictate that the relationship would be inversely proportional. The larger the tax loss the less relativistically it costs both to discover it and calculate it; i.e., if the IRS determines the tax liability of two individuals by considering all their bank deposits to be income and giving them no deductions, the costs are going to be roughly the same. The person having a greater tax liability will have a higher probability of being exposed to an impermissible

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[1]Obviously, alleged fraudulent requests which are not followed do not hinder an IRS determination of liability.

second punishment. Additionally, if one of those individuals sends the IRS a protest tax return, the IRS will spend less money on him because no money is spent to "discover" that he may have an increased tax liability. Further, if a husband and wife both have tax liabilities, the costs per person to investigate drops; escalating the windfall fraud penalty per man hour.

It is simply unreasonable to find that the increased cost to the government due to the Grants' supposed fraudulent conduct is reasonably approximated by an arbitrary $56,000 penalty.

4. The Government has repeatedly attempted to impose additional punishments against Alice M. Grant.

The question in this case is how many punishments against the Grants for the same offense will satisfy the Government, the Double Jeopardy Clause notwithstanding.

On August 15, 1985, the district court ordered Alice Grant to show cause why her probation should not be revoked for failure to make any payments on her $20,000 fine. The district court revoked Alice Grant's probation on October 9, 1985, and sentenced her to a term of one year on count four of the indictment. The district court suspended her sentence and placed her on probation for five years, on the condition that she be incarcerated until she paid the $20,000 fine. Alice Grant then filed an appeal, and the Court of Appeals ordered her released on

her own recognizance pending appeal. *United States v. Grant*, 816 F.2d 440, 441 (9th Cir. 1987). The Court of Appeals reversed the district court.

Not pleased with the reversal by the Court of Appeals of the illegal incarceration of Alice Grant, the Government tried again. On June 8, 1987, five days after the Court of Appeals' opinion was rendered in Grant II, the district court ordered Alice Grant to pay the $20,000 fine by June 30, 1987. On September 14, 1987, the district court found Alice Grant in civil contempt and again ordered her incarceration until the fine was paid. *United States v. Grant*, 852 F.2d 1203, 1204 (9th Cir. 1988). The Court of Appeals reversed the illegal incarceration of Alice Grant by the district court for a second time. The Court of Appeals in Grant III found that her punishment for failure to pay the fine was in direct conflict with this Court's decision in *Hill v. Wampler*, 298 U.S. 460, 463-64 (1936).

The Government now seeks a fourth punishment against Alice Grant for the same offense.

B. The Behavior Punished Is Already a Crime (Factor 5)

It was not disputed below that the civil fraud "penalties" were imposed based on the same conduct for which the Grants were previously prosecuted. This is also true as a matter of law.

Where the offenses for which the defendant is punished

cannot survive the "same-elements" test, the double jeopardy bar applies. *United States v. Dixon*, 509 U.S. 688, 696 (1993). The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment. *Ibid.*

The elements of criminal tax evasion and civil tax fraud are identical. *Gray v. C.I.R.*, 708 F.2d 243, 246 (6th Cir. 1983). Failure to file is also a lesser included offense of tax evasion. *McCarthy v. United States*, 394 U.S. 459, 471 & fn.26 (1969). Further, where the only defense to criminal tax conduct is a lack of wilfulness, failure to file and tax evasion "cover[] precisely the same ground." *Sansone v. United States*, 380 U.S. 343, 349-52 (1965). Therefore, tax evasion, tax fraud, and failure to file constitute the same offense under the instant facts for double jeopardy purposes.

The behavior to which the fraud penalty applies is already a crime.

C. Scienter is Required (Factor 3)

Scienter is required to impose a fraud penalty under 26 U.S.C. § 6653(b) (1988); otherwise, a negligence penalty is imposed under § 6653(a) & (d).

Balancing the *Hudson* factors, they weigh for the conclusion that the statutory scheme is so punitive in either

purpose or effect to transform it into a criminal penalty. Therefore, it is punishment for double jeopardy purposes.

II. THE COURT OF APPEALS ERRED BECAUSE *MITCHELL* IS DISTINGUISHABLE.

The only case decided by this Court concerning the Double Jeopardy Clause's application to the civil fraud penalty is *Helvering v. Mitchell*, 303 U.S. 391 (1938). As *United States v. Halper*, 490 U.S. 435 (1989), makes clear, however, *Mitchell* is distinguishable from the instant case.

> Mitchell was indicted and prosecuted for willful evasion of taxes. At trial, however, he was acquitted. The Government then brought an action to collect [his tax deficiency] and, as well, a 50% [fraud penalty]. . . . Because Mitchell was acquitted (and therefore not punished) in his criminal prosecution, the Court was called upon to determine **only** whether the statute imposed a criminal sanction. . . . While the opinion makes clear that the Government may impose both a criminal and a civil sanction with respect to the same act or omission, and that whether a given sanction is criminal is a matter of statutory construction, it does not address the question we face today: whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes "punishment" for the purpose of double jeopardy. . . . As noted above, the Court distinguished between the Double Jeopardy Clause's protection against

> "attempting a second time to punish criminally" and its prohibition against "merely punishing twice."

Halper, 490 U.S. at 442-43.

In other words, because Mitchell was never punished in the first governmental action, it was unnecessary to determine whether the fraud penalty violated the third protection afforded by the double jeopardy clause – no multiple **punishments** for the same offense. Instead, the Court was analyzing whether the fraud penalty proceeding violated the first protection afforded – no second criminal **prosecution** for the same offense after acquittal. The distinction is whether the focus is on the criminality of the proceeding (cannot be "criminally prosecuted" for a second time for the same offense after acquittal or conviction) or on the punishment (cannot be "criminally punished" twice for the same offense).

Mitchell held the determination of whether a proceeding was criminal was simply one of statutory construction and denied Mitchell the relief sought. *Halper*, 490 U.S. at 442. The *Mitchell*, one-part statutory construction test is simply the first test in *Hudson*'s two-part test. Since *Mitchell* only analyzed the criminality of the proceedings, it is, at best, dispositive only as to part one of the *Hudson* test. This offers the United States no comfort as the Grants admit that the civil fraud penalty was intended to be civil in nature.

CONCLUSION

The case the Court of Appeals relied upon applied *Mitchell* as dispositive of the question of whether a civil fraud penalty could be punishment for double jeopardy purposes. However, under the test recently set forth in *Hudson*, *Mitchell*'s rationale disposes of only the preliminary question of whether the fraud penalty was meant to be civil or criminal in nature. Under *Mitchell*, and the admission of the Grants, Congress intended the fraud penalty to be civil in nature.

Therefore, the dispositive issue is whether the statutory scheme is so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. Balancing the seven factors enunciated in *Hudson*, the imposition of the civil fraud penalty, under the instant facts, constitutes punishment for double jeopardy purposes.

Because the Court of Appeals did not consider the above factors, as required by *Hudson*, this Court should grant the Grants' petition and issue a writ of certiorari to review and reverse the decisions below.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MORTIMER L. GRANT; ALICE M. GRANT, Defendants-Appellants, and SHIELDS INVESTMENT GROUP; GRANT EDUCATIONAL EQUITY TRUST; IRENE MINKEMA; ROBERT M. CARLSON; SANTA BARBARA NATIONAL BANK; DONALD HENIGER; ALEXANDER LOMAKO; C.J. KAY EDUCATIONAL EQUITY TRUST; MICHAEL BISHOP, Defendants.

No. 97-56124

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1998 U.S. App. LEXIS 10611; 98-1 U.S. Tax Cas. (CCH) ¶50,465; 81 A.F.T.R.2d (RIA) 2213

May 13, 1998 **, Submitted

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a).

May 22, 1998, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE

RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *1998 U.S. App. LEXIS 20008.*

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV 95-6558-CBM. Consuelo B. Marshall, District Judge, Presiding.

DISPOSITION: AFFIRMED.

CORE TERMS: double jeopardy, civil fraud penalties, punished, collateral order, fraud penalties

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Patricia M. Bowman, Attorney, Charles E. Brookhart, Esq., DOJT - U.S. DEPARTMENT OF JUSTICE, Washington, DC.

MORTIMER L. GRANT, Defendant - Appellant, Pro se, Santa Barbara, CA.

ALICE M. GRANT, Defendant - Appellant, Pro se, Santa Barbara, CA.

JUDGES: Before: SCHROEDER, TROTT, and FERNANDEZ, Circuit Judges.

OPINION: MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Mortimer Leslie Grant and Alice M. Grant appeal pro se the district court's order denying their motion for partial summary judgment in this [*2] action by the United States to reduce federal tax assessments to judgment. The Grants contend that civil fraud penalties imposed under *26 U.S.C. § 6653*(b) violate the Double Jeopardy Clause because the Grants already have been criminally convicted and punished for willfully failing to file tax returns. We affirm.

Generally, a pretrial order denying a motion to dismiss on double jeopardy grounds is immediately appealable under the collateral order doctrine. See *Abney v. United States, 431 U.S. 651, 662, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977)*. The government contends that because the Grants seek protection from multiple punishments, rather than multiple prosecutions, their rights can be fully protected on appeal from final judgment, and so the collateral order doctrine does not apply. This contention lacks merit; if punishment is imposed, "then the constitutional right not to be doubly punished is lost, even if vindicated on appeal." *United States v. Chick, 61 F.3d 682, 685 (9th Cir. 1995)*.

The government also contends that we lack jurisdiction over Mr. Grant's appeal because he already has contested the fraud penalties in the Tax Court, and thus already has

suffered the [*3] exposure to double jeopardy that an interlocutory appeal is meant to prevent. In other words, Grant does not face a trial on the fraud penalties because the Tax Court's determination of liability is res judicata. This contention lacks merit because Grant seeks protection from multiple punishments.

The Grants contend that the Double Jeopardy Clause bars their civil fraud penalties, which they argue are the same offense as criminal failure to file tax returns. This contention lacks merit because additions to tax for fraud are not punishment for double jeopardy purposes. See *I & O Publ'g Co. v. CIR, 131 F.3d 1314, 1316 (9th Cir. 1997).*

AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MORTIMER L. GRANT; ALICE M. GRANT, Defendants-Appellants, and SHIELDS INVESTMENT GROUP; GRANT EDUCATIONAL EQUITY TRUST; IRENE MINKEMA; ROBERT M. CARLSON; SANTA BARBARA NATIONAL BANK; DONALD HENIGER; ALEXANDER LOMAKO; C.J. KAY EDUCATIONAL EQUITY TRUST; MICHAEL BISHOP, Defendants.

No. 97-56124

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

September 21, 1998, Filed

Before: SCHROEDER, TROTT, and FERNANDEZ, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion

for rehearing en banc is rejected.

APPENDIX C

UNITED STATES OF AMERICA, Plaintiff, v. MORTIMER L. GRANT, ALICE M. GRANT, SHIELDS INVESTMENT GROUP, GRANT EDUCATIONAL EQUITY TRUST, IRENE MINKEMA, ROBERT M. CARLSON, SANTA BARBARA NATIONAL BANK, DONALD HENIGER; ALEXANDER LOMAKO, C.J. KAY EDUCATIONAL EQUITY TRUST, and MICHAEL BISHOP, Defendants.

CV95-6558-CBM

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

June 16, 1997

MINUTE ORDER:

Defendant's Motion for Summary Judgment is denied (CBM).